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Nos. 71-881 and 71-886

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

LUIS MARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-381

FERRIS ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-396

LUIS MARTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to violate 18 U.S.C. 1465 by transporting obscene material interstate for the purpose of sale or distribution. In addi-

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tion, both petitioners were convicted of substantive violations of the statute—petitioner Marti for transporting 1,000 reels of obscene film from New York City to Baltimore, Maryland, and petitioner Alexander for the transportation of 10,000 copies of obscene magazines on two separate occasions. Petitioner Marti was sentenced to two concurrent terms of two years' imprisonment and fined a total of $15,000. Petitioner Alexander was sentenced to three concurrent terms of eighteen months' imprisonment and fined a total of $20,000. The court of appeals affirmed (App. A in both petitions).

1. The evidence revealed that petitioners participated in an enterprise engaged in the production and distribution of obscene material.[1] The material included magazines, films and playing cards produced in New York City from November 1968 to October 1969 (Tr. 4–6, 12–28, 37–38, 44–45).[2] Testimony revealed that petitioner Marti was engaged in the conspiracy as the producer of the obscene films (Tr. 156–157, 187–188, 198–199, 207–209, 450–451, 457–458, 462, 475–477, 806–807, 1030). The material produced was then transported to various cities, including Rich-

[1] Two others convicted with petitioners of engaging in the enterprise have also filed petitions for writs of certiorari. See *Portela* v. *United States*, No. 71–184, and *Manarite* v. *United States*, No. 71–5215. In connection with our joint opposition to those petitions (copies of which we are supplying to petitioners) we requested the clerk of the court of appeals to forward the exhibits concerning the obscene material to the Clerk of this Court.

[2] "Tr." refers to the transcript of the proceedings in the district court, a copy of which is on file with the Clerk of this Court in No. 71–5215.

mond, Philadelphia, Baltimore, Minneapolis, Cleveland, Chicago and Washington, D.C. (Tr. 154–159, 161–187, 196–209, 458–459, 461–464, 469–473, 788–790, 792–797, 801–806). Petitioner Alexander was shown to have received several deliveries of this material in Minneapolis, Minnesota (Tr. 159–187, 468–473). The material was distributed under the direction of a co-defendant, Richard Portela (See *e.g.*, Tr. 4, 14–28, 36–41, 149–151, 154–167, 181–184, 196–203, 464–466, 476–477, 788–796, 801–806, 1027–1028), and the operation was financed by another co-defendant, Samuel Manarite (Tr. 214–215, 793–794, 1027–1028).

The government introduced no extrinsic evidence to prove the obscenity of the materials at issue, but rather relied solely on the materials themselves. Petitioners attempted to show that the material did not exceed contemporary community standards and thus was not obscene by offering in evidence allegedly similar materials purchased in various parts of the country, films which were being publicly exhibited,[3] and the *Report of the Commission on Obscenity and Pornography* (Tr. 1266–1270, 1274–1275, 1286, 1295, 1300–1300A, 1302, 1308–1309, 1320–1325, 1328–1329, 1343–1345). The trial court rejected these offers of proof on the ground that the evidence tendered was inappropriate to establish contemporary community standards (Tr. 1270–1273, 1276, 1282, 1288–1290, 1294–

[3] Petitioners at one point also attempted to introduce into evidence newspaper advertisements for films being exhibited in public theaters in an effort to establish community standards (Tr. 1316–1319). At another point, however, it was stated that the newspapers were presented only as demonstrating that the films offered in evidence enjoyed national circulation (Tr. 1340).

1295, 1301, 1314, 1325–1327, 1329, 1331–1332, 1339–1340, 1342, 1344–1345, 1438–1439).

2. Both petitioners claim that the trial judge erred in excluding the proferred evidence regarding contemporary community standards.[4] Petitioner Marti also contends that the indictment was defective because the grand jury had not viewed the films at issue, that the statements of a co-conspirator were not in furtherance of the conspiracy and that the admission of these statements violated his rights under the Confrontation Clause of the Sixth Amendment. Petitioner Alexander also urges that there was insufficient evidence to tie him to the charged conspiracy, that 18 U.S.C. 1465 was improperly applied to him and that various portions of the trial court's charge to the jury were in error.

These contentions, as the court below held, do not merit reversal. The exclusion of the allegedly similar materials was proper because petitioners offered no proof that they enjoyed substantial community acceptance and, standing alone, they were not sufficiently probative of national community standards. The fact that the films were not shown to the grand jury does not warrant reversal and dismissal of the indictment. See *Costello* v. *United States,* 350 U.S. 359, 363–364.[5]

[4] See the government's brief in opposition to the petition for a writ of certiorari in *Miller* v. *United States*, No. 70–43. We are supplying petitioners with copies of the opposition.

[5] Moreover, the grand jury did not act in a vacuum as to the nature of the material involved. As the court of appeals noted, the magazines and other printed material involved in this case were shown to the grand jury. The jurors had a sufficient description of the films and could have called for their display if they thought it necessary to do so.

As found below, the statements of co-conspirators were clearly made in furtherance of the conspiracy; the admission of such statements does not violate the Confrontation Clause of the Sixth Amendment. See *Dutton* v. *Evans*, 400 U.S. 74; *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 194 (C.A. 3), certiorari denied, 401 U.S. 948; *Campbell* v. *United States*, 415 F. 2d 356, 357 (C.A. 6).

While there was no evidence that petitioner Alexander was aware of the identities of the other retailers or of all the details of the scheme, there was ample evidence, as the court of appeals held, from which the jury could infer that Alexander was aware of the nature and extent of the conspiracy. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556–559. In addition, the facts revealed that Alexander was more than a mere receiver who was unaware of this material until after it had been brought into the state. Thus, prior to the time any deliveries were made to him, Alexander was seen at a printer's office in New York City with Richard Portela. At that time, Portela introduced Alexander to one of the people who made deliveries and told Alexander that "he had a new line of hard core material that he would be sending out—sending him out samples." (Tr. 171–172). Further, since the evidence revealed that the deliverymen would be given $300 to $500 in expense money, would load thousands of copies of this material on a trailer, and would drive straight through to Minneapolis where they would contact Alexander (Tr. 172–187, 469–473), it was reasonable for the jury to infer that

these deliveries were undertaken in accordance with a preconceived plan agreed to by Alexander and the other conspirators.

Finally, the instructions of the trial court were proper. In instructing on contemporary community standards, no undue emphasis was placed on the fact that children are a part of the community. And the giving of the charge relating to material which might be deemed as appealing to persons with deviant sexual interests, in the absence of independent proof that the material was designed for and primarily disseminated to a clearly defined deviant sexual group, was not error. As this Court held in *Mishkin* v. *New York*, 383 U.S. 502, 509, this variation of the prurient appeal requirement applies whenever the "intended and probable recipient group" consists of deviates. In light of the explicitness of the material involved here, it is clear without independent proof that the "intended and probable recipient group" consisted of those with deviant sexual interests. The instruction on knowledge (set forth in Alexander Pet. 26, n. 9) was equally unobjectionable. This instruction properly conveyed to the jury the idea that knowledge that material is obscene must precede its actual transportation.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1971.

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REPLY BRIEF OF THE PETITIONER

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FERRIS JACOB ALEXANDER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

On October 12, 1971, subsequent to the filing of the petition in this case, probable jurisdiction was noted in *United States* v. *Orito,* No. 70-69. That appeal involves the constitutionality of 18 U.S.C. § 1462, an obscenity transportation statute closely allied to the one

here involved, 18 U.S.C. § 1465.[1] The constitutional problem there raised is whether § 1462 on its face is void for overbreadth in that it covers transportation of obscene matter for private possession and use, which is said to be permissible under *Stanley* v. *Georgia,* 394 U.S. 557 (1969).

In the instant case, the Government produced no evidence that the petitioner Ferris Alexander distributed or sold the large numbers of publications after he received them. So far as the record shows, he did no more than receive the publications; whether he destroyed or sold or otherwise used the publications is unknown. Section 1465 has thus been applied to him in a manner that essentially raises the same type of constitutional problem presented in *Orito* as to § 1462 on its face. Hence it may be appropriate to withhold action on the instant petition until *Orito* has been decided.[2]

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[1] Section 1462 outlaws the knowing use of any express company or other common carrier "for carriage [of any obscene matter] in interstate or foreign commerce."

Section 1465 outlaws the knowing transportation of any obscene matter "in interstate or foreign commerce for the purpose of sale or distribution."

[2] Petitioner made several constitutional challenges to § 1465 in the trial and appellate courts below, but not in the petition to this Court. One such challenge was that by virtue of *Stanley* v. *Georgia,* petitioner had a constitutional right to possess and keep these publications and that § 1465, as applied to outlaw such possession and without proof of sale or distribution, was unconstitutional. See petitioner's brief to Second Circuit, pp. 21-29.

To the extent that it may be necessary or appropriate for this Court to treat with this constitutional question in the exercise of its plenary jurisdiction over the judgment below, petitioner asks leave to amend the petition to include that question.

Insofar as the memorandum of the United States in opposition to certiorari addresses itself to the petition and the questions therein raised, petitioner replies as follows:

(1) Significantly, the Government has made no attempt to question the appropriateness of granting certiorari to review the two major questions set forth in the petition—(a) the *Kotteakos* "wheel-type" conspiracy problem, premised as it here is on almost pure speculation and inference by the jury, and (b) the application of § 1465 to a commercial retailer who can be said to have done no more than possibly be aware of and receive obscene matter transported by others in interstate commerce.

(2) The Government asserts (Opp. 5) that there was "ample evidence" from which the jury could infer that petitioner "was aware of the nature and extent of the conspiracy." But no evidence is cited in support of that assertion other than some dark speculation that petitioner "was more than a mere receiver" and that the deliveries must have been "undertaken in accordance with a preconceived plan agreed to by Alexander and the other conspirators" (Opp. 5, 6).[3] Such speculation serves only to justify petitioner's assertion (Pet.

[3] As to petitioner being "more than a mere receiver," the Government points only to the ambiguous statement of Portela, made either to petitioner or his brother, that he would be sending some new hard code material to Minneapolis. See Pet. 7-8. But that statement was never tied in to any shipment involved in the conspiracy or the violations of § 1465. See Pet. 17-18.

As to the "preconceived plan," the Government cites the wholly irrelevant fact that expense money was paid to the deliverymen for transporting material to petitioner (Opp. 5-6); such payment in no way indicated any agreement by petitioner to a "preconceived plan."

17-18) that there was a fatal lack of evidence to prove guilt beyond a reasonable doubt.

(3) The Government brushes aside the serious statutory problem with an offhand remark (Opp. 5) that petitioner "was more than a mere receiver who was unaware of this material until after it had been brought into the state." Implicitly, this is a concession that § 1465 does not apply to "a mere receiver." There was *no proof whatever* that petitioner knew of the nature of the two shipments of March 18 and April 20, 1969, before they were made (Pet. 18). But even if petitioner did know what he was to receive, the statutory problem remains whether § 1465 was meant to apply to a mere receiver who so receives obscene material, where he engages in no act of transportation. With respect to that problem, the Government is silent.

(4) The Government's assertion (Opp. 6) that the instruction "properly conveyed to the jury the idea that knowledge that material is obscene must precede its acutal transportation" is transparently wrong. The trial judge expressly rejected that idea and refused to convey it to the jury.

(5) The Government's defense of the prurient-appeal-to-deviants instruction (Opp. 6) overlooks the *Mishkin* insistence that such an instruction is proper only where there is proof that the material is "primarily disseminated to a clearly defined deviant sexual group" and that "the dominant theme of the material taken as a whole" appeals to such a group. There concededly was no such proof here.

(6) The Government's cavalier reference to its opposition brief in *Miller* v. *United States,* No. 70-43, merits no consideration with respect to the community stand-

ard issue raised in the instant petition. What the Government may have said in another case, involving different facts and a different presentation of the issue, is irrelevant here.

CONCLUSION

For these additional reasons, supplementing those in the petition, certiorari should be granted.

Respectfully submitted,

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